In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1077

RICHARD D. WILLIAMS, PETITIONER

v.

COMMANDING GENERAL, U. S. ARMY PERSONNEL CENTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1969. The petition for a writ of certiorari was filed on February 20, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was entitled to be released from the army by virtue of a treaty with the Western Shoshonee Nation of Indians in 1863 allegedly exempting the members of such Nation from compulsory military service, although subsequent Congressional legislation clearly imposed the obligations of military service on "every male citizen of the United States" between the ages of eighteen and twenty-six, and citizenship was conferred upon members of the Indian tribes by Act of Congress in 1940.

STATEMENT

After being inducted into the army pursuant to the order of his local Selective Service board in Battle Mountain, Nevada, petitioner, a member of the Western Shoshonee Nation of Indians, commenced the present habeas corpus action in the United States District Court for the Northern District of California. He contended that he was entitled to be released from the army by virtue of a treaty concluded between the United States and the Western Shoshonee Nation in 1863.[1] The district court denied relief (Pet. App. B), and the court of appeals affirmed *per curiam* (Pet. App. A).

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[1] During the pendency of the present habeas corpus action, petitioner was convicted by a general court-martial for refusal to obey the order of his superior to report to the Oakland Army Base preparatory to transfer with his unit to Vietnam. That conviction, which is presently pending in the military courts, is not involved in the present litigation.

ARGUMENT

The 1863 treaty with the Western Shoshonee Nation relied upon by petitioner (18 Stat. 689 *et seq.*) is set forth at Pet. App. C. It seems clear from the terms of that treaty that no exemption from compulsory military service was extended thereby to the members of the Western Shoshonee Tribe.[2]

The courts below held that, even assuming that such an exemption had been granted, any such provisions of the 1863 treaty had been superseded by subsequent Acts of Congress. These holdings were correct. *Ex Parte Green*, 123 F. 2d 862 (C.A. 2), certiorari denied, *sub nom.*, *Green* v. *McLaren*, 316 U.S. 668; *Totus* v. *United States*, 39 F. Supp. 7 (E.D. Wash.); see also *Albany* v. *United States*, 152 F. 2d 266 (C.A. 6); *United States* v. *Claus*, 63 F. Supp. 433 (W.D. N.Y.).

Congress provided in the Selective Training and Service Act of 1940 that "every male citizen of the United States" [between the age limits fixed by Congress and except as otherwise provided by the Act] "shall be liable for training and service in the land or naval forces of the United States." 54 Stat. 885 (carried forward without substantive change in the present Universal Military Training and Service Act, 50 U.S.C. App. 454(a)). In the same year, Congress enacted the Nationality Act of 1940, which

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[2] Nor did the government "concede" the contrary, as petitioner asserts (Pet. 7). The government's argument below merely assumed, *arguendo*, that the treaty conferred such an exemption. See page 4 of the government's brief in the court of appeals, a copy of which is part of the record on file with the Clerk of this Court.

in pertinent part provided (54 Stat. 1138, now 8 U.S.C. 1401(a)(2)):

> The following shall be nationals and citizens of the United States at birth: * * *
>
> (b) A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, that the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property * * *.

As the court stated in *Ex Parte Green, supra*, (123 F. 2d at 864), "the 1940 statute unequivocally made [petitioner] a citizen." The intent of Congress to impose the usual obligations of citizenship on members of the Indian tribes is clear from the fact that it expressly excepted only "the right of such person to tribal or other property." *Ibid.* The right which petitioner allegedly acquired as a brave of the Western Shoshonee Nation to be free from compulsory induction into the armed forces of the United States is not a "property" right; it cannot be transferred or exchanged. If it ever existed, it was not "property" but a purely personal right.

While not disputing the long established doctrine that subsequent Acts of Congress supersede (as a matter of domestic law) rights previously granted by treaty,[3] petitioner argues that Congress by Act of

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[3] See, *e.g.*, *The Cherokee Tobacco*, 11 Wall. 616; *Head-Money Cases*, 112 U.S. 580, 597-599; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 699; *Sanchez* v. *United States*, 216 U.S. 167; *Moser* v. *United States*, 341 U.S. 41, 45; *Hijo* v. *United States*, 194 U.S. 315; *Chae Chan Ping* v. *United States*, 130 U.S. 581, 600.

March 3, 1871 (set forth at Pet. App. F) reconfirmed "any treaty lawfully made and ratified with any * * * Indian nation or tribe prior to" the effective date of the statute. Petitioner argues (Pet. 10-11) that the 1871 Act granted by the treaty made the rights with the Western Shoshonee in 1863 "irrevocable." But the fact that Congress chooses to re-enact or reconfirm rights granted by prior legislation or treaties does not affect the power of a subsequent Congress, by passage of a statute inconsistent with those provisions, to supersede them.

Petitioner also contends (Pet. 8-9) that the Nationality Act of 1940 purporting to bestow citizenship on all the members of the Indian nations was invalid because it did not require the consent of the Indians. Congress, however, does not need to obtain the consent of persons living within the territories of the United States in order to make them citizens. The power to confer citizenship on inhabitants within the territorial boundaries of a nation is inherent in the very concept of sovereignty. See *Boyd* v. *Nebraska*, 143 U.S. 135, 162, 170.[4] *Elk* v. *Wilkins*, 112 U.S. 94, cited by petitioner, is not in conflict with these views. That case held only that the Fourteenth Amendment—which states that all "persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States"—did not operate to bestow citizenship on members of the Indian nations.

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[4] Prior to the Nationality Act of 1940, Congress had conferred citizenship on various tribes or classes of Indians without reference to consent. See 24 Stat. 388, 390 (Act of February 8, 1887).

The Court held that the words "subject to the jurisdiction thereof" meant "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance" (112 U.S. at 102). It ruled that this provision did not apply to Indian tribes by virtue of their quasi-sovereign status. The Court, however, specifically recognized (*id.* at 101, 103-106) that Congress had the power to confer citizenship on members of the Indian nations.

Petitioner argues, finally, that if the Nationality Act of 1940 made him a citizen, he has effectively renounced that citizenship by adhering to tribal traditions and refusing government offers of financial assistance (Pet. 12). Such conduct is, however, not sufficient to bring about the loss of petitioner's United States citizenship within the terms of Congressional legislation specifically and exclusively detailing the ways in which such citizenship may be abandoned. 8 U.S.C. 1481; see also *Kawakita* v. *United States*, 343 U.S. 717.

In sum the courts below properly held that, whatever the rights granted to petitioner under the 1863 treaty, Congress has by superseding legislation plainly evinced its intent that petitioner and other members of the Indian nations be subject to the Selective Service laws and to conscription as are other citizens. *Ex Parte Green*, 123 F. 2d 862 (C.A. 2), certiorari denied *sub nom.*, *Green* v. *McLaren*, 316 U.S. 668.

CONCLUSION

The petition for a writ of certiorari should be denied.

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